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IN THE
SUPREME COURT OF THE UNITED STATES

COOK COUNTY, ILLINOIS,

Petitioner,

-against-

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE THE CITY OF NEW YORK, THE CITY OF BOSTON, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF CHICAGO, THE CITY OF INDIANAPOLIS, THE CITY OF MILWAUKEE, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The City of New York, the City of Boston, the City and County of San Francisco, the City of Chicago, the City of Indianapolis, the City of Milwaukee, the International Municipal Lawyers Association, the National Association of Counties and the National League of Cities respectfully submit this brief as amici curiae supporting the petition for certiorari of Cook County, Illinois. Amici urge

this Court to grant Cook County's petition because the Seventh Circuit's decision in this case, which conflicts with other Circuits in allowing a local government to be sued under the federal False Claims Act ("FCA"), involves a vitally important issue for local governments around the country facing potentially overwhelming liability exposure under the Seventh Circuit's decision.[1] Allowing this decision to stand without review will subject local governments to the FCA's massive punitive remedies of treble damages plus penalties and will undermine this Court's long-standing presumption that local governments are immune from punitive remedies in the absence of explicit statutory authorization.

The City of New York is a political subdivision of the State of New York that annually receives billions of dollars in federal funds either directly from the United States or through the State for numerous essential municipal services and programs. In some instances, the City of New York is responsible for providing these essential services to its citizens and for implementing these programs, and in other instances, the City is responsible for determining eligibility for these programs. Generally, the federal government and the State of New York disburse the funds and monitor their expenditure.

The City of Boston is a political subdivision of the Commonwealth of Massachusetts. The City and County of San Francisco is a political subdivision of the State of California. The City of Boston and the City and County of San Francisco annually receive significant sums

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[1] The filing of this amici curiae brief is accompanied by the written consent of all parties.

Pursuant to Rule 37.6, counsel for amici are the sole authors of this brief and no one other than amici or their counsel made a monetary contribution to the preparation or submission of the brief.

of federal funds either directly from the United States or through the State for essential municipal services and programs. Subjecting the City of Boston and the City and County of San Francisco to treble damage liability under the FCA would harm local taxpayers who would be called upon to pay those damages, and would also harm the beneficiaries of essential local services, who would face the reduction or elimination of those services to pay those damages.

The City of Chicago is the largest municipality in the Seventh Circuit, which rendered the erroneous decision below. The City of Indianapolis is the largest city in Indiana and is located within the Seventh Circuit. The City of Chicago and the City of Indianapolis are very concerned that if certiorari is not granted in this case and the decision set aside, that decision will improperly subject them to treble damages and attorney's fees under the FCA.

The City of Milwaukee is a political subdivision of the State of Wisconsin. In fiscal 2001, the City of Milwaukee received approximately $50.6 million in federal dollars to either spend or administer primarily for Community Development Block Grants and for public health and law enforcement purposes.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided

services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

The National Association of Counties is an organization whose members include county governments and officials from throughout the United States. The organization has a compelling interest in legal issues that affect local governments.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. NLC serves as a national resource and advocate on behalf of over 1,800 cities and 49 state municipal leagues, whose membership totals more than 18,000 cities, towns and villages.

The False Claims Act was enacted in 1863 with "the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 781, 120 S. Ct. 1858, 1867 (2000), citing *United States v. Bornstein*, 423 U.S. 303, 309, 96 S. Ct. 523, 528 (1976). Over the years, Congress amended the FCA many times, making the most significant amendments in 1986 by, *inter alia*, increasing the statute's mandatory civil remedies from double to treble damages and from a $2,000 penalty to a $5,000-$10,000 penalty for each violation. 31 U.S.C. §3729(a); *Stevens,* 529 U.S. at 785, 120 S. Ct. at 1869. Under the statute as amended in 1986, a whistleblower, known as the "relator," may bring a *qui tam* civil action "for the person and for the United States Government." 31 U.S.C. §3730(b)(1). The relator is generally entitled to receive between 15 and 30 percent of the total recovery. 31 U.S.C. §§3730 (d)(1); (d)(2).

Prior to the 1986 amendments, it appears that the statute was not invoked against local governments, and with one exception, it appears that the statute was not invoked against states. *See United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980) (court vacated district court decision that states were not "persons," holding instead that the district court had lacked subject matter jurisdiction over the case). Subsequent to 1986, however, there have been an increasing number of cases brought against governmental entities, thereby subjecting localities to the statute's severe punitive structure and allowing private individuals to collect a windfall at taxpayers' expense.

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858 (2000), this Court examined the question of whether a State is a "person" for purposes of the FCA. In concluding that a State is not a "person" under the FCA, the Court held that the treble damages and civil penalties imposed under the FCA were "punitive in nature," *id.* at 784-85, 120 S. Ct. at 1869, and that the imposition of such punitive damages would be inconsistent with state *qui tam* liability in light of the long-standing "presumption against imposition of punitive damages on governmental entities." *Id.*, citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981). The rationale for this common law protection is that punitive sanctions punish innocent taxpayers, not actual wrongdoers, and subject governmental entities to undue fiscal constraints. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 259-64, 101 S. Ct. at 2756-58. In *City of Newport,* this Court stated the general rule that, in light of the presumption of municipal immunity, "Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 263, 101 S. Ct. at 2758, citing *Pierson v. Ray,* 386 U.S. 547, 555, 87 S. Ct. 1213, 1218 (1967).

In holding Cook County amenable to suit under the FCA, the Seventh Circuit rejected this interpretive rule, holding just the opposite: that Congress must specifically indicate its intent to exempt local governments from a statutory scheme imposing punitive remedies. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 979 (7th Cir. 2002). The Seventh Circuit's holding is in direct conflict with the Third Circuit and the Fifth Circuit, which applied the "well-settled presumption" that local governments are immune from punitive remedies, in holding that local governments are not amenable to suit under the FCA. *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002); *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002).

The Seventh Circuit's holding that local governments are subject to the punitive sanctions of the FCA has profound implications for innocent local taxpayers. As a result of the Seventh Circuit's decision to allow the assessment of punitive treble damages and penalties against local governments, funding for local government services may decrease significantly. Local government liability under the FCA will adversely affect localities' ability to serve their residents. It is local governments that actually administer many federal programs, providing services such as education, health, child welfare and environmental protection, and it is the localities' ability to provide these critical services that is jeopardized by the treble damages and up to $10,000 per claim penalty imposed by the FCA.

Amici therefore are vitally interested in the outcome of this suit. They submit that, in seeking to combat private military profiteering during the Civil War by enacting the FCA, and in subsequently amending the

statute to augment punitive remedies, Congress never intended to disrupt the administration of federal programs at the local level. But that is exactly the result of permitting FCA liability, since it allows recoveries of treble damages, penalties, and a windfall to an individual whistleblower, all at the expense of local taxpayers. Amici urge the Court to grant Cook County's petition and reverse the Seventh Circuit's determination that local governments are "persons" subject to suit under the FCA.[2]

REASONS FOR GRANTING THE PETITION

I

RESOLUTION OF THE CIRCUITS' CONFLICT OVER THE VIABILITY OF THE PRESUMPTION OF LOCAL GOVERNMENT IMMUNITY FROM PUNITIVE REMEDIES IS CRITICAL TO ASSESSING FCA LIABILITY.

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981), this Court held that municipalities were immune from punitive damages under the Civil Rights Act of 1871, 42 U.S.C. §1983. In so holding, the Court reviewed the long history of municipal immunity, and reiterated that "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Id.* at 260 n.21, 101 S. Ct. at 2756

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[2] Amici address only whether a local governmental entity is a proper *qui tam* defendant, not whether it is a proper *qui tam* relator. *See Stevens*, 529 U.S. at 787 n.18, 120 S. Ct. at 1871 n.18 (leaving open question of whether States can be "persons" for purposes of commencing FCA *qui tam* action after finding that States were not "persons" for purposes of *qui tam* liability).

n.21. The rationale for this common law immunity from punitive remedies is simple: punishment should be imposed only against actual wrongdoers and not against the taxpaying citizens of the community. *Id.* at 261-63, 101 S. Ct. at 2756-58. The presumption against punitive remedies protects "the public from unjust punishment, and the municipalities from undue fiscal constraints." *Id.* at 263, 101 S. Ct. at 2757-58. The Court recognized the serious fiscal consequences of imposing punitive remedies on local governments, stating that the "windfall" to the plaintiff is "likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* at 267, 101 S. Ct. at 2760.

In *Stevens*, this Court reiterated the presumption against the imposition of punitive remedies on governmental entities in holding that States are not "persons" subject to suit under the FCA. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. at 784-85, 120 S. Ct. at 1869-70. The Court specifically rejected the argument that *City of Newport* was inapplicable in the context of the FCA, reading *City of Newport* to mean that the Court was "concerned with imposing punitive damages on taxpayers under any circumstances." *Id.* at 785 n.15, 120 S. Ct. at 1869 n.15. Further, this Court explicitly found that the FCA remedy of treble damages plus civil penalties is, in fact, "punitive in nature." *Id.* at 784, 120 S. Ct. at 1869.

In light of *Stevens*, both the Third Circuit and the Fifth Circuit relied on the "well-settled presumption" that local governmental entities -- a county in the Third Circuit, and a school board in the Fifth Circuit -- are not subject to punitive damages. *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d at 222; *United*

States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d at 491-92. The Fifth Circuit found it unlikely that Congress had made a judgment that "denying the schoolchildren of Orleans Parish needed services, or requiring the taxpayers of Orleans Parish to pay higher taxes, is justified in light of the relatively minor benefit to the federal treasury," and declined to find the school board amenable to suit under the FCA in the absence of explicit language in the text of the statute. *Garibaldi*, 244 F.3d at 492. The Third Circuit similarly found that the "lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA." *Dunleavy*, 279 F.3d at 224.

Although this Court in *Stevens* had already applied the traditional governmental immunity analysis to the punitive remedies in the FCA, the Seventh Circuit rejected that analysis here and declined to apply such a presumption. First, the Seventh Circuit found that the FCA's punitive remedy scheme differed from the punitive remedy scheme under 42 U.S.C. §1983, since under the FCA "at least a portion of the recovery will come from the monies taken by the municipality through its false claims, whereas under §1983 both the compensatory and punitive damages come directly from the tax base." *United States ex rel. Chandler v. Cook County*, 277 F.3d at 978.

Second, contrary to the Third and Fifth Circuits, which required an explicit statement of congressional intent to *abrogate* governmental immunity in the face of a punitive statute, the Seventh Circuit required an explicit statement of congressional intent to *exempt* municipalities from the FCA's punitive remedies. *Id.* at 979. The Seventh Circuit thus reversed the presumption of municipal immunity from punitive remedies utilized by this

Court in *Stevens* in analyzing whether a State was subject to suit under the FCA.

Thus, the Circuits are split on whether the presumption of local government immunity from punitive remedies applies in the case of the FCA, and on how to overcome that presumption. The resolution of these differing interpretations is critical for the thousands of local governmental units that may be subject to enormous punitive remedies under the Circuits' disparate interpretation of the FCA.

II
RESOLUTION OF THE CIRCUITS' CONFLICT OVER CONGRESSIONAL INTENT IS CRITICAL TO ASSESSING FCA LIABILITY.

Where a statute is found to be punitive, local governments are immune from liability unless Congress clearly intended to authorize such liability. In analyzing the language and legislative history of the FCA, the Circuits have reached differing conclusions as to congressional intent.

The Seventh Circuit's conclusion that local governments are "persons" subject to FCA liability was based primarily on its belief that at the time of the FCA's enactment in 1863, municipal corporations were presumptively included in the definition of "person." *Chandler*, 277 F.3d at 974, 979, 980. The Seventh Circuit relied for this proposition on *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685-89, 98 S. Ct. 2018, 2033-35 (1978), citing it three times. *Chandler*, 277 F.3d at 974 ("The Supreme Court has noted that, by 1844, both private and municipal corporations were presumptively included within the meaning of 'person'"), 979, 980. But in *Monell*, the Court was considering the meaning of the word "person" in

42 U.S.C. §1983, originally enacted in 1871; the FCA was enacted eight years earlier, in 1863. The *Monell* Court found that it was clear by 1871 that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis," *Monell*, 436 U.S. at 687, 98 S. Ct. at 2034, and that the "Deveaux doctrine" stating otherwise had been abandoned by 1844. *Id.*, citing *Louisville R. Co. v. Letson*, 2 How. 495, 558 (1844) and *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809).

However, the Court did not find that municipal corporations were presumptively included within the meaning of "person" by 1844. Rather, the Court found that the principle of treating corporations as persons was not "automatically without discussion extended to municipal corporations" until 1869, six years *after* the FCA was enacted. *Monell*, 436 U.S. at 688, 98 S. Ct. at 2034, citing *Cowles v. Mercer County*, 7 Wall. 118, 121, 74 U.S. 118 (1869). For purposes of analyzing the meaning of "person" in the Civil Rights Act of 1871, the Court in *Monell* also looked to the 1871 Dictionary Act, passed shortly before the Civil Rights Act, which provided "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, §2, 16 Stat. 431; *Monell*, 436 U.S. at 688-89, 98 S. Ct. at 2034-35. The Dictionary Act, of course, could not have applied to an interpretation of the word "person" in the FCA, since the FCA was enacted six years earlier.

Despite this legislative history, the Seventh Circuit concluded that local governments were included in the FCA's definition of "person" in 1863, and further found that the 1986 amendments to the FCA did not change the meaning of "person" or explicitly exempt municipalities.

Chandler, 277 F.3d at 974. First, the Seventh Circuit considered 31 U.S.C. §3733, which enables the Attorney General to issue civil investigative demands to "any person" possessing "information relevant to a false claims law investigation." 31 U.S.C. §3733(a)(1). Section 3733(l)(4) defines "person" as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." This Court in *Stevens*, citing to the Dictionary Act, 1 U.S.C. §1 and relying on the presumption that States are not covered by the term "person," found that the existence of a definitional provision of "person" that explicitly included States in §3733, together with the absence of such a provision in §3729, "suggests that States are not 'persons' for purposes of *qui tam* liability under §3729." *Stevens*, 529 U.S. at 784 & n.14, 120 S. Ct. at 2748 & n.14. The Seventh Circuit, however, relying on its mistaken belief that local governments were presumptively included in the definition of "person," viewed the civil investigative demands provision, as well as several other provisions added by the 1986 amendments, as insufficient to "support an inference that Congress intended [municipalities] to be exempt." *Chandler*, 277 F.3d at 975.

Second, the Seventh Circuit relied on the congressional failure in 1986 specifically to exempt municipalities from the FCA definition of "person" as evidence of intent, because, according to the Seventh Circuit, Congress was "aware of the presumption that municipalities are included within the meaning of the term 'person.'" *Id.* at 979. However, the *Monell* presumption that municipalities are included in the meaning of the term "person" was limited to the Civil Rights Act of 1871, and there is no reason for Congress to have assumed that the definition of "person" also applied to the FCA. In addition, the Dictionary Act, which in 1871 had originally included

"bodies political and corporate" in the presumptive definition of "person," was amended in 1874 to eliminate that phrase. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 81, 109 S. Ct. 2304, 2318 (1989) (Brennan, J. dissenting)(citing T. Durant, Report to Joint Comm. on Revision of Laws 2 (1873)).

In contrast, the Third and Fifth Circuits found no authority to indicate that local governments were intended to be included as "persons" either in 1863 or in 1986. *Dunleavy*, 279 F.3d at 224; *Garibaldi*, 244 F.3d at 494. The Fifth Circuit viewed this Court's determination in *Monell* that local governments are "persons" under § 1983 "as premised on specific indications in the legislative history" of that statute that do not appear in the legislative history of the FCA. *Garibaldi*, 244 F.3d at 494. The Third Circuit found that the legislative history of the 1986 amendments "cannot pass muster in light of the *Stevens* Court's express rejection of the pertinent 1986 legislative history as erroneous and of questionable value." *Dunleavy*, 279 F.3d at 225. Both Circuits further found that not only was there an absence of evidence of congressional intent to abrogate local government immunity, but that "Congress' imposition of treble damages is powerful evidence that Congress did not intend to subject local governments to punitive damages under the FCA." *Id.* at 225; *Garibaldi*, 244 F.3d at 493 ("We are convinced that the punitive damages regime of the False Claims Act discussed above reflects a congressional intent that the term 'person in the liability provisions of the False Claims Act not include local governments").

Thus the views of the Seventh Circuit on the one hand, and the Third and Fifth Circuits on the other hand, evidence a serious disagreement as to the meaning of the language and legislative history of the FCA. The question of congressional intent to subject thousands of

local governments to liability under the FCA presents a staggering fiscal issue that should be settled by this Court, rather than allowing such liability to depend on the fortuity of geographic location.

III
ALLOWING LOCAL GOVERNMENT LIABILITY UNDER THE PUNITIVE SCHEME OF THE FCA THREATENS DISRUPTION OF SERVICES AND DIVERSION OF RESOURCES FROM FEDERAL OBJECTIVES.

Resolution of the issue presented in this case is critical to local governments. Rather than pursuing federal monies for profit, local governments apply for and utilize federal funds for the benefit of their residents. They do so in cooperation with states and the federal government, sharing both legal and financial responsibility for implementing a wide variety of government programs that are promoted by the federal government through federal funding. While the federal government and states monitor and fund many government programs, it is the unique role of local governments to implement those programs and provide direct services.

Because of the range of services provided by local governments with federal financial support, however, all of these services are targets under the FCA. In recent years, there has been a dramatic increase in the number of FCA suits against local governments, exposing those governments and their taxpayers to significant litigation costs, the risk of enormous punitive remedies and the threatened disruption of government services. Yet, it would appear to be glaringly inconsistent to find that the legislators who provided federal funds to localities to achieve various programmatic objectives would want to

expose these localities to draconian punitive remedies that might well interfere with their ability to implement those objectives. The threat that FCA liability would disrupt services and divert resources from federal objectives mandates that liability for local governments be based on an explicit congressional directive rather than on inference or presumption.

Further, localities, unlike private corporations, are partners with the states and the federal government in implementing federal programs. Exposing localities to punitive treble damages and civil penalties through FCA litigation can interfere with statutory procedures for administration of federal programs designed to ensure both compliance with federal requirements and the provision of government services. These statutory and regulatory procedures -- such as reporting requirements, monitoring, audits, reauthorizations, withholding of selected payments or cutting off funds altogether -- give federal officials ample means to ensure local government compliance with federal standards while enabling the provision of services to continue. By contrast, the sheer magnitude of FCA treble damage exposure for local governments, given the width and breadth of federal funding programs, will undermine the cooperative mechanisms established by Congress to ensure the delivery of services in accordance with federal objectives.

CONCLUSION

The petition of Cook County, Illinois for a writ of certiorari should be granted.

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